IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1180

OLD DOMINION BRANCH NO. 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,

Appellants,

—v.—

HENRY M. AUSTIN, L. D. BROWN and ROY P. ZIEGENGEIST,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF VIRGINIA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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The American Civil Liberties Union respectfully moves for leave to file a brief *amicus curiae* in this case. The appellants' attorney granted consent by letter, which has been filed with the Clerk. One of appellees' attorneys denied consent by phone.

The American Civil Liberties Union is a non-profit, nonpartisan organization whose current membership is in excess of 180,000. During its fifty-three year existence, the ACLU has been concerned with a wide range of issues arising under the Bill of Rights, but its first interest has always been and remains the First Amendment.

This case involves a statute which, in our opinion, decreases the freedom of speech available to the citizens of the State of Virginia. We believe it lays a direct burden upon the rights protected by the First Amendment and because of its overbreadth and vagueness discourages the right to speak freely on controversial matters of public and private concern.

We believe our brief will be of assistance to the Court in the resolution of the issue before it.

Respectfully submitted,

MELVIN L. WULF
Attorney for Movant

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The interest of *amicus* is set out in the Motion For Leave to File, *supra*.

Opinion Below

The opinion of the Supreme Court of the State of Virginia is reported at 213 Va. 377, 192 S.E.2d 737.

Statute Involved

Code of Virginia §8-630 (1957):

> Action for insulting words.—All words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace shall be actionable.

Statement of the Case

Suit under the Virginia insulting words statute followed publication of the following matter in the monthly newsletter of the Old Dominion Branch No. 496 of the National Association of Letter Carriers:

> THE SCAB
>
> Some co-workers are in a quandary as to what a scab is; we submit the following: After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a *scab*.
>
> A scab is a two-legged animal with a cork-screw soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.
>
> When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.
>
> No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. *The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.*

Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.

LIST OF SCABS

Henry Austin
Lewis Bolton
E. D. Brown
L. D. Brown
R. L. Broughman
R. L. France
Roger Hanson
Randolph Jacobs
Richard Leonard
F. E. Moriconi
Judson Proctor
Wilford Tevis
Hunter Whitlock
R. L. Worsham
R. P. Ziegengeist

Questions Presented

1. Whether the Virginia insulting words statute on its face and as construed is unconstitutionally overbroad in that it is not limited in its application to "fighting words" which threaten an immediate breach of the peace or to words which under the First and Fourteenth Amendments may otherwise be proscribed.

2. Whether the Virginia insulting words statute is unconstitutionally vague.

3. Whether under *New York Times Company* v. *Sullivan* and its progeny, the Virginia insulting words statute is unconstitutional as applied to the publication of a monthly union newsletter which for purposes of encouraging Union membership truthfully identified non-union members in a "List of Scabs" and described "scabs" in a critical and derogatory manner.

Summary of Argument

At issue in this case is the fundamental question of the validity, under the First and Fourteenth Amendments, of a state statute providing a private civil damage remedy for words which "from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace." The circumstance—a labor dispute—in which the alleged insults (characterized as defamatory by the Virginia Supreme Court) were published brings into sharp focus the adverse effect on vigorous exercise of first amendment freedoms that will inevitably result if the Virginia Supreme Court's decision is permitted to stand.

In point I, we examine the Virginia statute, on its face and as construed, to show that the statute is both overbroad and vague. With respect to overbreadth, it is clear that the statute (which has been applied irrespective of the fact that no immediate, violent encounter is threatened) has not been limited in its application to "fighting words" as defined by this Court. Nor can it be said with any assurance that the Virginia courts have construed this statute as applicable only to words which are *both* insulting and defamatory. The unavailability of such limiting construction is made clear by the charge to the jury, approved by the

Virginia Supreme Court in this case. With respect to the vagueness of the word "insults" it is apparent that the statute which refers to the words "usual construction" and "common acceptation" contains no standard at all to guide either a prospective defendant or a jury. The jury charge in this case also demonstrates that no state court construction has eliminated the inherent vagueness of the Virginia statute. Since the statute is both vague and overbroad, it cannot constitutionally be applied to appellants irrespective of whether their publication might be actionable under a properly drawn statute.

Point II contends that the Virginia insulting words statute is unconstitutional as applied to the Union publication at issue in this case. The statements on which appellants' liability was based were made in the context of a labor dispute and are constitutionally protected as speech concerning a matter of public interest. Accordingly, under the decisions of this Court in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964) and *Rosenbloom* v. *Metromedia Inc.,* 403 U.S. 29 (1971), appellees could recover civil damages for insulting words, if at all, only if appellants' publication contained defamatory false statements of fact made with actual malice—that is, with knowledge that the statements were false or with reckless disregard of truth or falsity. We argue that the publication at issue in the case contained no defamatory false statements of fact but only metaphor and hyperbole which, under *Greenbelt Cooperative Publishing Association* v. *Bresler,* 398 U.S. 6 (1970), could only have been understood as such and could not, constitutionally, be labelled defamatory. Furthermore, the Virginia Supreme Court's failure to apply the constitutional standards of "actual malice" and "clear and convincing proof" compels reversal of the judgment in this case.

ARGUMENT

I.

The Virginia "insulting words" statute which, on its face and as construed, permits civil damage recovery for the utterance of nondefamatory "insulting words" without requiring an immediate danger of breach of the peace and without adequately defining "insults" is overbroad and vague in violation of the First and Fourteenth Amendments to the Constitution.

A. *The statute is overbroad.*

The Virginia "insulting words" statute, formerly known as the "anti-dueling statute," [1] provides a civil damage remedy for "all words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace." Code of Virginia §8-630 (1957). Under *Gooding* v. *Wilson,* 405 U.S. 518 (1972), the facial overbreadth of the Virginia statute is beyond dispute.

In *Gooding,* the Georgia statute attacked for overbreadth and vagueness proscribed the use "to or of another, and in his presence, [of] opprobrious words or abusive language, tending to cause a breach of the peace. . . ." Mr. Justice Brennan, writing for the majority, stated: "[This statute] punishes only spoken words. It can therefore withstand . . . attack upon its facial constitutionality only if,

[1] Note, "Defamation in Virginia—A Merger of Libel and Slander," 47 Va. L. Rev. 1116, n. 5 (1961). See also *W. T. Grant & Co.* v. *Owens,* 149 Va. 906, 141 S.E. 860 (1928). In addition to Virginia only Mississippi and West Virginia provide a civil damage remedy for insulting words. 1942 Miss. Code Ann. §1059 (1957); Code of W. Va. §55-7-2 (1946).

as authoritatively construed by the Georgia courts, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments." 405 U.S. at 520 (citations omitted).[2] On its face, the Virginia statute, which applies to insulting words even if uttered outside the presence of the offended party, is broader than the Georgia statute which, by its express terms, applied only to words uttered in the complaining party's presence.[3]

Since Virginia's proscription against "words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace" is even broader than Georgia's prohibition against "opprobrious words or abusive language tending to cause a breach of the peace," the Virginia statute can be upheld, *a fortiori*, only if "it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments." *Gooding* v. *Wilson*, 405 U.S. at 520 (citations omitted). In considering this question of overbreadth, "it matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute,"

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[2] The fact that the Virginia statute imposes a civil rather than a criminal sanction in no way dilutes the applicability of the overbreadth doctrine in this case. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Moreover, as this Court observed in *New York Times Co.* v. *Sullivan*, the chilling effect of civil damage actions may be greater than that of criminal prosecution. Id. at 277-79.

[3] The addition in the Virginia statute of the words "usual construction and common acceptation" does not lessen the facial overbreadth of the Virginia statute, since these terms are themselves inherently vague, see *infra* at 13-14, and in no way avoid the statute's application to threats of future as well as present breaches of the peace.

Gooding v. *Wilson, supra* at 520;[4] rather, the relevant inquiry is whether the Virginia Courts have managed to convert an otherwise overbroad statute into one that is not susceptible of application to constitutionally protected speech.

In *Gooding,* the Court held that the Georgia statute's overbreadth had not been cured by state court construction since the statute had not been applied only to "fighting words," that is, to words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." *Gooding* v. *Wilson, supra* at 524 [quoting from *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942)]. In support of its conclusion, the Court in *Gooding* noted that the dictionary definitions of "opprobrious" and "abusive" were very broad, and included as to the former words "conveying or intended to convey disgrace" and, as to the latter, "harsh insulting language." The Court also found that the Georgia state cases had applied the statute to words covered by these dictionary definitions, although they were not words "which by their very utterance . . . tend to incite an immediate breach of the peace." 405 U.S. at 525 (quoting *Chaplinsky* v. *New Hampshire,* 315 U.S. at 572).

The following words have been characterized as "insults" under the Virginia statute: a written statement that plaintiff had trespassed on defendant's property and had

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[4] We contend that appellants' publication clearly was constitutionally protected. See, *infra,* at 15-19. However, even if, ultimately, it were not so characterized, this case is one in which, under *Broadrick* v. *Oklahoma,* —— U.S. ——, 41 U.S. Law Week 5111 (June 25, 1973), an overbreadth attack is available. The Virginia statute reaches only speech, not conduct, and the statute's overbreadth is both real and substantial.

acknowledged doing so;[5] a newspaper article charging a lawyer with having committed acts of professional misconduct;[6] the posting of notices in defendant's retail store that no checks or charges were to be accepted from plaintiff,[7] and a letter sent by defendant to a neighbor's wife falsely intimating that she had invited the writer to meet her.[8] As the Virginia statute has been construed by the Virginia state courts, therefore, it is clear that it is not limited to "face to face words" which naturally tend to provoke violent resentment on the part of the addressee.

Furthermore, the statute is overbroad not only because it is not confined to fighting words, but also because it is not even confined to words which are defamatory.

In rejecting the appellants' contention that the insulting words statute was overbroad and vague, the Virginia Supreme Court seems to have held that, under prior decisions, actions for insulting words have been treated in all respects as actions for libel or slander.[9] In fact, however, neither in this case nor in previous cases, has the insulting words statute been consistently so construed.

It is clear from the following language contained in the jury charge, which was approved by the Virginia Supreme

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[5] *Darnell* v. *Davis*, 190 Va. 701, 58 S.E.2d 68 (1950). In *Darnell*, although the words characterized as defamatory by the court were held actionable as insults under the statute, the court concluded that they were absolutely privileged.

[6] *Carwile* v. *Richmond Newspapers, Inc.*, 196 Va. 1, 82 S.E.2d 588 (1954).

[7] *Shupe* v. *Rose's Stores, Inc.*, 213 Va. 374, 192 S.E.2d 761 (1972).

[8] *Rolland* v. *Batchelder*, 89 Va. 664, 5 S.E. 695 (1888).

[9] However, in a suit under the statute, it is clear that publication to a third party is not required.

Court on appeal, that the jury in the instant case was free to find words "insulting" under the statute although such words would not be defamatory:

> The statements complained of herein are to be considered defamatory and libelous if the respective plaintiffs prove by a preponderance of the evidence that such statements were in words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace. (213 Va. 377, ——, 192 S.E.2d 737, —— (1973).)

The jury was thus instructed that if a word is insulting, it is defamatory, rather than that if it is defamatory, it is insulting. For this reason, it cannot be claimed that the Virginia statute has been construed as applicable only to cases involving common law defamation. Moreover, the trial court treated the appellees' action as brought under the Virginia insulting words statute, and not as a blend of the common law action for libel and the insulting words. Thus, this case was neither commenced nor tried as a libel case.[10]

If, except for the requirement of publication, the Virginia courts in fact allow recovery in actions under the statute only where recovery is permitted at common law, and apply the same rules of law to both classes of cases, there would be no purpose served by proceeding, as appellees have in this case, under the statute, rather than at common law.

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[10] One commentator has concluded that despite the Virginia courts' general statements that actions for insulting words are actions for libel or slander, the courts have permitted recoveries under the insulting words statute where no recovery would be permitted under common law. See, Note, "Defamation in Virginia—A Merger of Libel and Slander," 47 Va. L. Rev. 1116, 1129 (1961).

It does not seem unwarranted, therefore, to conclude that some advantage may well inhere in an election to proceed under the statute and that the statute has not, in fact, been narrowly construed.

B. *The Virginia insulting words statute is void for vagueness.*

The insulting words statute at issue in this case is void for vagueness since it fails to define the insults made actionable other than by reference to "usual construction" and "common acceptation." There is no ascertainable standard by which either the speaker, writer or a jury can evaluate whether the words alleged to be actionable under the statute are in fact proscribed.

Under principles long established by this Court, a statute which subjects the exercise of First Amendment rights to an unascertainable standard will be held void for vagueness. *Gooding* v. *Wilson,* 405 U.S. 518 (1972); *Ashton* v. *Kentucky,* 384 U.S. 195 (1966). See also *Coates* v. *Cincinnati,* 402 U.S. 611 (1971). Although "vague laws in any area suffer a constitutional infirmity . . . [w]hen First Amendment rights are involved, . . . [the Court will] . . . look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton* v. *Kentucky,* 384 U.S. at 200. Examination of the standard applied to the appellants' publication by the trial court in its charge to the jury reveals that no precise delimitation of words actionable under this statute has been forthcoming. In pertinent part, the trial court, in its charge to the jury, stated:

> The statements complained of herein are to be considered defamatory and libelous if the respective plaintiffs prove by a preponderance of the evidence that

such statements were in words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace.

* * * * *

In determining whether or not the language complained of is insulting and tends to violence and a breach of the peace, the words must be construed in the plain and popular sense in which the rest of the community would naturally understand them; that is, they are to be construed according to their usual construction and common acceptation under the circumstances of this case. That is, in a labor dispute.

* * * * *

[M]ere words of abuse indicating that one party dislikes another or that he has a low opinion of him, without more does not amount to defamation. A certain amount of vulgar name calling, indicating hostility or ill will, under certain circumstances is tolerated by the law . . . .

The last quoted paragraph of the instruction compounded the already present vagueness and confusion, since it failed to provide the jury with any notion of how much "vulgar name calling" is non-defamatory. The trial court also failed to furnish the jury with any indication of the point at which the vulgar name calling "tolerated by the law" had gone so far as to be actionable. No requirement of a finding of immediate danger of face to face violent confrontation was imposed, hence, not even the "fighting words" doctrine was available to cure the statute's vagueness.

II.

Under *New York Times Company* v. *Sullivan* and *Rosenbloom* v. *Metromedia, Inc.*, the Virginia insulting words statute is unconstitutional as applied to the publication of a monthly union newsletter which for purposes of encouraging union membership identified non-union members in a "List of Scabs" and described "scabs" in a critical and derogatory manner.

We have argued that the statute on its face is overbroad and vague, and that no limiting construction, either in terms of "fighting words" or "defamation," has been forthcoming from the Virginia courts. In the event, however, that the Court should conclude that the application of the insulting words statute has been limited by prior cases to fighting words or defamatory words, then the statute must be held unconstitutional as construed and applied to appellants.

The Union publication which was the subject of the civil damage action in this case concerned a matter of public interest—the relationship between union and non-union members, and the union's evaluation of some employees' refusal to join the union although enjoying benefits won for all employees by the union. Consequently, the Virginia Supreme Court erred in refusing to apply the constitutional standards required by *New York Times Co.* v. *Sullivan, supra,* and *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971), that appellees, although private individuals, may not recover civil damages unless it appears by clear and convincing proof that the statements were false and defamatory and were made with actual malice, that is, with knowledge that they were false or with reckless disregard of whether or not they were false.

A. *The publication concerned a matter of public interest.*

Rosenbloom v. *Metromedia, Inc.* makes clear that where matters of public interest are concerned, the state law remedy for defamatory false statements must yield to the constitutional protections of the First Amendment, whether plaintiffs are public officials or figures or private individuals. Since it was conceded in *Rosenbloom* that the subject matter of the news broadcast in question—a public campaign to enforce the obscenity laws—concerned an issue of public or general concern, the Court was not then called upon to delineate the reach of that term. 403 U.S. at 40-41. However, *Rosenbloom* and its progenitors, *New York Times Company* v. *Sullivan, supra,* and *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967), provide the analytical framework for resolving the question whether appellants' publication concerned a matter of public interest.

The basic principle underlying *New York Times Company* v. *Sullivan, Time, Inc.* v. *Hill* and *Rosenbloom* v. *Metromedia, Inc.,* is the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270 (citations omitted). While political speech concerning public officials is at the heart of the First Amendment, it has been made perfectly clear that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs." *Time, Inc.* v. *Hill,* 385 U.S. at 388. Thus "[o]ur efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompass far more than politics in a narrow sense," *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. at 41, and freedom of discussion "must embrace all issues about

which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U.S. 88, 102 (1940).

"The dissemination of information concerning the facts of a labor dispute" has long been "regarded as within that area of free discussion that is guaranteed by the Constitution." *Thornhill* v. *Alabama,* 310 U.S. at 102. See also *Senn* v. *Tile Layers Protective Union,* 301 U.S. 468 (1937). As the Court observed more than thirty years ago, "The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern." *Thornhill* v. *Alabama, supra* at 103.

Relations and disputes between union and non-union members are no more insulated from discussion than are relations between labor and management. Conflicts may arise in a variety of ways within the general field of labor relations, and although under *Rosenbloom,* the individual, whether a public or private person, is not entirely stripped of his interest in privacy as to certain matters, insofar as his activities fall within the area of public interest or concern, the constitutional protections of *New York Times Company* v. *Sullivan, supra,* apply. *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. at 44, n. 12, and at 48. In this case, the comments made by appellants in the union newsletter pertained only to the issue of union membership and the lack of esteem in which non-union members are held. This publication, in short, did not discuss either intimate and personal details of appellees' lives or matters beyond those of legitimate public concern.

The attempt made by the Virginia courts to insulate from criticism an individual's decision whether or not to join a

union by labelling it a "private decision" and hence outside the *Rosenbloom* public interest test, ignores the clear holdings of this Court that the focal point in cases of this kind is not the distinction between public and private individuals or institutions, but rather the events in which individuals or institutions are involved. Although such a decision may in a sense be a "private" one, its impact is widely felt not only within the union, but also in the larger society. A similar effort by a state court to insulate a public matter from comment and criticism by employing a privacy label was recently rejected by this Court in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971).

Like the petitioner in *Keefe*, appellees would prefer to restrain critical discussion of their activities. But this preference cannot be enforced at the expense of the First Amendment. As the Court stated in *Time, Inc.* v. *Hill*, "exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." 385 U.S. at 388.

The Virginia Supreme Court also ignored the important role played by a union newspaper in reaching its constituency and informing this important sector of the public of union views and activities. To the extent that the Virginia court's ruling may be read as limiting the *Rosenbloom* public interest test to communications aimed at undifferentiated mass audiences, it ignores the vital and varied nature of the press in the United States. Numerous publications such as union newsletters, campus newspapers and many others are circulated principally to defined sectors of the

public although they may come to the attention of and be of interest to those outside the primary target audience. If such publications, by reason of their special appeal to particular groups, are deprived of the protections applicable to the more traditional mass media, an anomalous situation results. In effect, the more broadly based is the audience reached, the broader is the applicability of the public interest test despite the fact that much of the audience in fact has no special interest in the matters under discussion.

On the other hand, under the Virginia court's decision, to the extent that the publication reaches a narrow but intensely interested and affected portion of the public, the First Amendment's protections are narrowed on the basis of a constricted view of "the public interest" test.

The boundaries of the "public interest" are necessarily broad, and in a pluralistic society such as ours, in which decisions affecting this interest are made through "a complex array of boards, committees, commissions, corporations and associations, some only loosely connected with the Government." *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 at 163-64 (1967) (concurring opinion of Mr. Chief Justice Warren, quoted in *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. at 42), a narrow reading of the phrase ignores the essential function of the First Amendment.

CONCLUSION

For the reasons stated above, the decision of the Virginia Supreme Court should be reversed.

Respectfully submitted,

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August 1973